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Supreme Court of The United States.

OCTOBER TERM, 1906.

DAVID L. HODGEN, ELLA M. PARKER, GEORGIANA M. HODGEN AND WILLIE E. HODGEN, HEIRS-AT-LAW OF JAMES L. HODGEN, Appellants.

VS.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD AND MARY L. GRIFFITH, Appellees.

No. 135

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF FOR APPELLEES.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
For Appellees.

14563

Supreme Court of The United States.

OCTOBER TERM, 1903.

DAVID J. HODGES, ELLA M. PARKER, GERTRUDE M. HODGES AND WILLIE E. HODGES, HEIRS-AT-LAW OF JAMES L. HODGES, Appellants.

VS.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD AND MARY L. GRIFFITH, Appellees.

No. 155

Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

While the statement of facts made by counsel for appellants (Brief pp. 1 & 2) is, in the main, correct, we desire to call attention to an error con-

tained therein and to a few additional facts shown by the record. In the brief for appellants said counsel makes the following statement; "William R. Colcord, the father of the appellees, filed a contest against the entry of John Gayman August the 23rd, 1889;" whereas, in fact, this contest was filed on July 23d, 1889 (R. pp. 4 & 11). The record also shows that Colcord was not only the prior contestant for the tract of land involved herein, but that a trial was had before the local land office at Oklahoma City between him and Gaymon (the entryman) upon the allegations contained in the former's affidavit of contest and that the decision of the local officers was in favor of Gaymon and Colcord appealed to the Commissioner of the Gen'l. Land Office where the decision of the local officers was affirmed and Colcord thereupon appealed to the Secretary of the Interior, where said cause was pending at the time this court rendered its decision in the case of Smith vs. Townsend, 149 U. S. 490 (R. pp. 6-10-11); that after Colcord had entered said tract as a homestead, Hodges contested said entry claiming to be a prior settler on said tract and charging that Colcord was disqualified to make entry of any land in Oklahoma; that said contest was tried before the local officers and carried by successive appeals to the Secretary of the Interior who decided the issues of law and fact involved therein in favor of Colcord and, consequently, dismissed Hodges' contest finding, among other things, that Gaymon's relinquish-

ment was the result of Colcord's contest (R. pp. 5-10); that, after the issuance of patent to Colcord, Hodges commenced this action in the District Court of Oklahoma County wherein a general demurrer to plaintiff's petition was filed and sustained and the cause dismissed. (R. pp. 3, 12 & 13.)

ARGUMENT.

Counsel for appellants urge but one proposition as a ground for reversing the judgment of the lower court, which may be fairly and concisely stated as follows: That, he being disqualified (under the Act of Congress of March 2nd, 1889) to enter or acquire title to any land in Oklahoma, Gaymon's homestead entry covering the tract involved was void *ab initio* and, consequently, did not segregate the tract from settlement by a qualified homestead entryman; hence, Hodges settlement made on July 22nd, 1889, being one day prior to the filing of Colcord's contest against Gaymon's entry, was the first legal appropriation of said tract for homestead purposes. Thus it is seen, that this entire controversy is hinged upon the question of whether or not Gaymon's said nomestead entry was a mere nullity for all purposes or was only voidable and subject to be set aside upon a proper application and showing in support thereof. It is not contended that said entry was irregular upon its face, but that it was procured by fraud and perjury on the part of the entryman. This contention of counsel for appel-

lants is based principally upon the following declaration in Calhoun vs. Violet, 173 U. S. 60, to-wit: "The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the President having been conclusively determined, it follows inevitably, as a legal result, that an entry of land made under such circumstances was void, and that the ruling by the Land Department so holding was correct." We confidently claim that the rule so laid down by this court does not support the contention of counsel, as it is only after the fact of the entryman's disqualification has "been conclusively determined" that this court says "it follows inevitably, as a legal result, that an entry of land made" by such entryman is void. It would seem that no extended argument is necessary to show the clear and important distinction between the rule thus announced by this court and the contention of counsel, who claims that such an entry is void without any preliminary showing or determination whatever.

We can hardly conceive of the practicability of a rule of law declaring a homestead entry (valid upon its face) absolutely void because of false swearing or other fraud committed by the entryman in its procurement. How, when and by what tribunal could such an entry be considered void *ab initio*, without the fact or facts rendering it invalid having been first established? The rule applicable to the question under consideration is

correctly stated by the Hon. Secretary of the Interior in McMichael vs. Murphy, 20 L. D. 147, as follows: "Although White had entered the Oklahoma Country during the prohibited period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remainedforever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void, but voidable only. True White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void but voidable." See also McMichael vs. Murphy, 70 Pac.1 89, wherein the Supreme Court of Oklahoma approve the conclusion reached by the Secretary on this question and cite numerous decisions of this court in support thereof.

Furthermore, it should be remembered that this court was not attempting to state the distinction between a void and a voidable entry in Calhoun vs. Violet, *Supra* and, consequently, may not have guarded the language used with that degree of care which would have been exercised had the case in hand required that such a distinction be drawn. As a general rule no instrument or proceeding can be said to be absolutely void

unless its invalidity is apparent upon its face or upon the face of the record showing such proceeding. As is well stated by Mr. Black, in his work on judgments, under the the title of "Voidable and Void Judgments" (Sec. 170), "the differences, though real and fundamental, are not always marked with sufficient sharpness in juristic writing, and courts have been known to speak of a judgment as void when they meant no more than that it was liable to be over-turned if properly attacked." It is also stated in the same section of said work that, "Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. ***On the other hand, a voidable judgment is one which, though not a mere nullity, is liable to be made void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared.*** It may be here stated, however, that it is very doubtful whether a judgment can ever be considered entirety void except in the single case where there was a total want of jurisdiction to render it. And even then, in the case of a domestic judgment, it is a serious question whether the lack of jurisdiction must not appear on the face of the record in order to entitle the courts to treat it as a nullity." It is also declared in Sec. 218 of the same work that, "the result deducible from a majority of the cases

seems to be that it is only when the judgment appears upon its fact to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes." While this rule has, probably, been more often declared in text books and decision relating to judgments than in those upon any other subject, it is equally applicable to other proceedings conferring or attempting to confer legal rights.

It being conceded that Gaymon's homestead entry was valid upon its face, it, therefore, required the filing of a proper contest affidavit, supported by sufficient evidence, to procure the cancellation of said entry, and no reason can be assigned or imagined why the first party to file such contest affidavit and diligently prosecute same should not, upon the cancellation of said entry, be entitled to the preference right of entry prescribed by statute and the rules of the Interior Department. The mere settlement of Hodges could never have established the disqualification of Gaymon as a homestead entryman and, consequently, could never have resulted in the cancellation of his entry. The Secretary of the Interior having found from the evidence that Gaymon relinquished his homestead entry because of the filing and prosecution of Colcord's contest challenging the validity of same, this finding of facts will not, in the absence of fraud be re-examined or questioned by the courts. Calhoun vs. Violet *Supra*.

Counsel for appellants cites the case of Moffat vs. United States, 112 U. S. 24, as supporting his contention but, in doing so, he again fails to make the proper distinction between a conveyance that is wholly void and one that is merely voidable, i. e. subject to be set aside upon the facts rendering it invalid being established in a direct proceeding for that purpose. In the case last cited it is specifically held that, "In a suit by the United States directly assailing a patent and seeking its cancellation for fraud in the conduct of their officers, the burden of proof is upon the United States to show a fatal irregularity or corrupt conduct on their part." On the contrary, according to the contention of counsel, there was no necessity of a suit to set aside the patent but a pualified entryman might have initiated a right to the land described therein by settlement in total disregard of the rights claimed under said patent. In our opinion, the other authorities cited by counsel in support of his said contention are equally inapplicable and we deem it unnecessary to further prolong our discussion of the question involved.

We, therefore, respectfully submit that there is no merit whatever in the contention of counsel for appellants and that the judgment of the lower court should be affirmed.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
For Appellees.